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Ontario Labour Relations Board HIGHLIGHTS

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SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in June of this year. These decisions will appear in the May/June issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org

Employment Standards – Practice and Procedure – Reconsideration – The Director of Employment Standards requested reconsideration of the Board's direction that 10% of an amount (less than $1000) found owing by the employer should be retained by the DES, rather than $100 – The Board decided to reconsider its decision even though the DES was not in attendance at the hearing, given that the value in addressing inconsistency in Board decisions and the DES' position on this issue over time outweighed the fact the request was made by a party not in attendance – After reviewing case law showing the lack of consistency in the application of administrative costs in successful employee appeals and in partially successful employer appeals (where the Board reduces an order to pay to less than $1000), the Board found the administrative costs should be addressed as follows: in successful employee appeals, where the employer does not voluntarily pay the amount within 30 days of the Board's direction, the direction will become an order to pay with an attached 10% administrative cost to those orders over $1000 and a $100 cost to those under $1000; in partially successful employer appeals, which reduce the amount of wages owing to less than $1000, the proportional formula used in section 120(6) should be used by the Board to determine the administrative cost – Decision varied

BAC CONTRACTING LTD. O/A BAC CONTRACTING; RE: SIMONE MARCHINI; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 1099-14-ES; Dated June 3, 2015; Panel: Mary Anne McKellar (12 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – After the employer became aware the Board had certified the union, it brought a reconsideration request taking issue with whether delivery of the certification application by the union to its old address should cause the Board to revoke the certification – The employer incorporated its business federally and at the same time registered its business as operating in Ontario with the Ministry of Government Services – In November 2012 the employer moved, advising Industry Canada of its new address, but failed to file a notice of the change of address with Ontario – In April 2014 the union filed its certification application relying upon an old business card it alleged it received in 2013 from one of the owners of the company and a current Ontario corporate profile report, both of which showed the old address – First, the Board was satisfied that the union had no knowledge of the change of address – Second, it did not accept that there was anything ambiguous about either the business card or the Corporation Profile Report: the business card was at one time valid and there was nothing to suggest

it was not still valid and the Corporation Profile Report secured from the Ministry the morning of filing the application was also a reliable source – Third there was no ambiguity present when the application was left in the mail box, even though the name on the locked door was not the same as the employer's – There was no note indicating that the employer no longer was there and where they could be reached – Finally while the Board accepted that the employer was also acting in good faith and did not know it had to register its new address in Ontario, exercising its discretion to permit the late response would irreparably prejudice the union as five new sites were indicated in the employer's late response –The employer was the author of its own misfortune and must bear the consequences of its failure to comply with the requirement to update is corporate address – Reconsideration dismissed

LBM CONSTRUCTION SPECIALTIES INC.; RE: ALLIED CONSTRUCTION EMPLOYEES LOCAL 1030, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; OLRB File No. 0121-14-R; Dated June 24, 2015; Panel: Lee Shouldice (28 pages)

Certification – Construction Industry – Fraud – Membership Evidence – Reconsideration – One of two employees who was at work on the application filing date (AFD) advised the union on the AFD that he was revoking his membership and also filed a s. 64 application alleging fraud, which he subsequently withdrew after settling the matter with the union – The employer then filed its own s. 64 application and asked for reconsideration of the certificate, in both cases relying on the employee's revocation of the membership card – The Board found there was no reasonable basis for asserting the union had obtained its certificate by fraud – The Board noted the union was entitled to rely on membership evidence it has secured before the AFD so long as that evidence of membership is not revoked before that date, whereas a revocation of membership on the AFD is another matter: while a purported revocation on an AFD cannot affect the number of employees in the bargaining unit who are members of the applicant on the AFD (given the Board's finding that the entire day is a single point in time), it may be relevant to the Board's exercise of discretion whether to order a vote under s. 128(13) – However, even assuming the employer's allegations were true, the union's reliance upon the membership card was not fraud on the Board – Applications dismissed

MAACKON CORPORATION; RE: LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; OLRB File No. 1723-14-R & 0313-15-R; Dated June 30, 2015; Panel: Harry Freedman (11 pages)

Employment Standards – A compliance order was issued against the employer requiring it to pay vacation pay on holiday pay and to calculate the vacation pay in a certain way – The employer acknowledged that when it paid its employees vacation pay twice a year, it breached the Act by failing to pay vacation pay on the given public holidays during the period – It took issue however with the ESO's calculation of what was owing – The Board reviewed the relevant sections of the Act and determined that the phasing of vacation pay payments (whether bi-weekly, monthly or semi-annually) does not determine the amount of public holiday pay for any given holiday – The Board found that in determining the vacation pay liability for a given public holiday an employer is to calculate the total amount of "regular wages" earned by an employee in the four-week period preceding the statutory holiday, plus the vacation pay (of at least 4 percent or any higher percentage that may apply in the workplace) that is payable on those regular wages, divided by 20 – Application granted

MUNRO LTD.; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0374-14-ES; Dated June 24, 2015; Panel: Patrick Kelly (7 pages)

Related Employer – Sale of Business – Stay – UFCW asserted that Sofina was a successor employer or alternatively that it was a related employer to Great Lakes – Sofina sought a stay of proceedings given a court order that "no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued…" – The Board reviewed *Spectrum Supply Chain Solutions* and found the reasoning on the court's supervisory role and the statutory jurisdiction over the preservation of the debtor's assets to be persuasive – Distinguishing the case from *Price Waterhouse* which considered a narrow order, the Board found the one before it was broader as it stayed all proceedings in respect of "the Debtors or the Property" – The Board noted the application was with respect to the Debtor (since the UFCW

was asserting that the collective agreement that was binding on the Debtor is now binding on Sofina) and the Property (since the UFCW was seeking a declaration on the basis of the sale of Great Lakes' assets and the operation of such assets by Sofina) – The Board found the application was not isolated only to Sofina, but it was in respect to Great Lakes and the assets that were sold to Sofina – Accordingly the motion was granted – Proceedings Stayed

SOFINA FOODS INC.; RE: UNITED FOOD & COMMERCIAL WORKERS, LOCAL 175; OLRB File No: 3488-14-R; Dated June 4, 2015; Panel: Matthew R. Wilson (10 pages)

COURT PROCEEDINGS

Duty of Fair Representation – Judicial Review – Practice and Procedure – H was a successful candidate for a permanent position which pursuant to the collective agreement should have been awarded to the most senior candidate with the requisite skills, knowledge, training and aptitude – Other more senior employees grieved the competition and, after the documents were turned over to CUPE, it was discovered that the School Board had made an error and a more senior candidate should have been awarded the position – CUPE and the School Board settled the senior employee's grievance by placing him in the position and offered H two options: he accepted the one that resulted in a reduction in his gross annual salary – The Board dismissed H's DFR complaint, which alleged that CUPE had failed to give him adequate notice of the grievance and arbitration (which never occurred as it was settled), that he should have been told of the grievance earlier so he could mitigate the risk of potential displacement, and that CUPE took too long to settle the grievance, thereby causing him more damages – On review the court found that the Board did not breach procedural fairness: the Board was not required to accord H a hearing given the statute (ss. 96, 99 and 110) and its Rules (39 and 41); he was given the full opportunity (three extensive submissions) to make his submissions in writing and there was no issue of credibility that needed assessment; and finally, H knew the case he had to meet – On the merits the Board decision was found to be reasonable since it considered the factual matrix of the case, it reviewed H's pleadings and submissions, it considered the subject of notice, both for the filing of a grievance and the arbitration, it considered the parameters of s.74 of the Act as it relates to the conduct of a union and it also considered the damages that it could order, even if H could have established a *prima facie* case – The Board conducted the analysis in a way that was justified, transparent and intelligible and its decision to dismiss H's application fell within the range of possible acceptable outcomes which are defensible in respect of the facts and law – Application dismissed

JOHN HARRISON; RE: ONTARIO LABOUR RELATIONS BOARD; RE: CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4400; Divisional Court File No. 189/14; Dated June 5, 2015; Panel: J. Wilson, Harvison Young and Tzimas, JJ. (18 pages)

Colleges Collective Bargaining Act – Judicial Review – Practice and Procedure – OPSEU's application for judicial review challenged the Board's decision that the words "under the supervision of and in the manner determined by the Ontario Labour Relations Board" included the authority to set the date on which a strike vote could be held – The court found that this was not a true question of jurisdiction, but rather one involving an interpretation of the Board's home statute – Accordingly, the standard of review was reasonableness – The Court found that the matter involved policy and practical considerations for the Board, as well as the interpretation of the legislation within the overall context of labour relations in this province – The justification was clear: the plain reading of the words "supervise" and "manage" include setting the date for a vote and the understanding that the Board has the authority to set the date for a strike vote is within the range of possible, acceptable outcomes – Finally the Court found that the Board's reasons were more than sufficient, noting that even if they applied the standard of correctness the Board's decision would be correct – Application dismissed

ONTARIO PUBLIC SERVICE EMPLOYEES UNION; RE: COLLEGE EMPLOYER COUNCIL; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 397/14; Dated June 17, 2015; Panel: Then, Molloy and Lederer, JJ. (10 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Royal Ottawa Health Care Group - Brockville Mental Health Centre Divisional Court No. 15-2123 **(Ottawa)**	2460-14-HS 2999-14-IO 3000-14-IO	Pending
EMT Contractor Division Inc Divisional Court No.32-15 **(London)**	3514-13-R	Pending
Carlene Bailey Divisional Court No.173/15	0480-13-U	Pending
Valoggia Linguistique Divisional Court No.15-2096	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No.49/15	0229-13-R	Pending
Sentry Electrical (Canada) ULC Divisional Court No. 041/15	0505-14-R	Pending
Charles Zubovits Divisional Court No. 3/15	1368-04-U	September 29, 2015
Royal Ottawa Hospital Divisional Court No.14-62782 **(Ottawa)**	2461-14-IO	Pending
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	September 17, 2015
College Employer Council Divisional Court No.397/14	1143-14-CV	Dismissed June 17, 2015
Dean Warren Divisional Court No.345/14	2336-13-U	September 22, 2015
Donald A. Williams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	Dismissed June 5, 2015
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	May 11, 2015 Reserved